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Supreme Court, U.S.
FILED
MAY 26 1992
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No. 91-7749

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

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JOSE ANTONIO ORTEGA-RODRIGUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

JOSEPH C. WYDERKO
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly dismissed an appeal by a convicted defendant who fled following his conviction and was recaptured and returned to custody 11 months later.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

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JOSE ANTONIO ORTEGA-RODRIGUEZ, PETITIONER

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OPINIONS BELOW

The orders of the court of appeals dismissing petitioner's appeal (Pet. App. I) and denying petitioner's motion to reinstate the appeal (Pet. App. II) are unreported.

JURISDICTION

The order of the court of appeals dismissing petitioner's appeal (Pet. App. I) was entered on July 19, 1991, and the order denying petitioner's motion to reinstate the appeal (Pet. App. II) was entered on January 22, 1992.[1] The petition for a writ of

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[1] Although petitioner's motion to reinstate his appeal was not denominated a petition for rehearing, it was styled in the alternative as a motion "for reconsideration of order granting

(continued...)

certiorari was filed on March 17, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of possession, on board a vessel of the United States, of cocaine with intent to distribute it, in violation of 46 U.S.C. 1903(a); and conspiracy to commit that offense, in violation of 46 U.S.C. 1903(j). Petitioner fled before sentencing and was sentenced in absentia. He was recaptured 11 months later and was resentenced to 188 months' imprisonment, to be followed by five years of supervised release. The court of appeals dismissed petitioner's appeal. Pet. App. I.

1. The evidence at trial showed that, on November 7, 1988, the Customs Service received reports of a possible air drop of narcotics in the Cay Sal Bank area of the Bahamas, which is located south of the Florida Keys. At dusk that evening, a Customs aircraft in that area observed another plane circling a boat at a low altitude and dropping 20 bales into the water, which were picked up by the boat. When the plane left the area, the Customs pilot followed it to Cuban airspace before abandoning pursuit. The

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[1](...continued)
appellee's motion to dismiss," and it was based on Rule 40 of the Federal Rules of Appellate Procedure. We therefore believe that, for jurisdictional purposes, petitioner's motion to reinstate his appeal should be regarded as a petition for rehearing pursuant to Fed. R. App. P. 40 and that his petition is therefore timely.

Customs pilot was unable to relocate the boat when he returned to the area of the air drop 40 minutes later. Pet. App. III, at 654.

Early the next morning, a second Customs aircraft searched for the boat. It spotted a boat that appeared to fit the first pilot's description -- the Wilfred from Miami, Florida -- at anchor off the south beach of Cay Sal Island. The pilot then flew over the site where the air drop had been observed the night before, but he did not see any bales or other vessels. When he returned ten minutes later, the pilot saw the Wilfred traveling away from the island toward Cuba. He noticed a brown burlap cover over the back of the boat that hid its name. When he flew over the island, the pilot saw numerous bales wrapped in white plastic and stacked above the high water mark on the beach. He also observed footprints between the stacked bales and the beach area where the Wilfred had been sighted earlier. Pet. App. III, at 655.

The Customs pilot asked the Coast Guard to intercept the Wilfred. Shortly thereafter, the Coast Guard contacted the Wilfred by radio and asked a series of standard pre-boarding questions. After responding three times that the Wilfred's last port of call was Cayo Blanco, the captain of the Wilfred changed his answer and stated that he had departed from Key Largo, Florida. The captain also responded that the Wilfred was headed back to Key Largo and that the purpose of the voyage had been fishing. Pet. App. III, at 655-656. The Coast Guard then boarded the Wilfred, but the boarding party did not find any contraband. Petitioner and two co-defendants, Roberto Mieres-Borges and Osvaldo Becerra-Flores, who

were on board, were arrested. Bahamian law enforcement agents later recovered 11 bales containing cocaine from the beach site on Cay Sal Island. Id. at 656.

2. After being convicted by a jury, petitioner failed to appear for sentencing on June 15, 1989. He was sentenced in absentia to 235 months' imprisonment, to be followed by five years of supervised release. A week later, the district court issued a warrant for petitioner's arrest. Petitioner was arrested 11 months later and remanded to custody. The district court subsequently granted petitioner's motion to vacate his sentence and for resentencing. See Gov't Motion to Dismiss Appeal ii-iii.

While petitioner was a fugitive, his two co-defendants appealed their convictions. On December 18, 1990, the court of appeals ruled that the evidence at trial was insufficient to sustain Becerra-Flores' conviction, but it affirmed Mieres-Borges' conviction.[1] Pet. App. III, at 652-664. Based on the court of appeals' decision, petitioner moved for a judgment of acquittal. On January 11, 1991, the district court denied the motion and resentenced petitioner to 188 months' imprisonment, to be followed by five years of supervised release. On June 21, 1990, petitioner was convicted of contempt of court, in violation of 18 U.S.C. 401(3), and failure to appear for his original sentencing, in violation of 18 U.S.C. 3146. On April 15, 1991, petitioner was

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[1] The court of appeals' ruling that the evidence was sufficient to sustain Mieres-Borges' conviction was based primarily on an inculpatory statement given by Mieres-Borges to a Customs Service agent after his arrest. Pet. App. III, at 660-661.

sentenced to 21 months' imprisonment on those charges; that sentence was made consecutive to his 188-month sentence. See Gov't Motion to Dismiss Appeal iii.

3. Following his resentencing on the narcotics offenses, petitioner appealed. Relying on United States v. Holmes, 680 F.2d 1372 (11th Cir. 1982), cert. denied, 460 U.S. 1015 (1983), and United States v. London, 723 F.2d 1538 (11th Cir.), cert. denied, 467 U.S. 1228 (1984), the government moved to dismiss the appeal on the ground that petitioner had waived his right to appeal the narcotics conviction when he fled after conviction and before sentencing. On July 19, 1991, the court of appeals entered an order granting the motion to dismiss the appeal. Pet. App. I. The court subsequently denied petitioner's motion to reinstate that appeal. Pet. App. II.

ARGUMENT

1. The court of appeals' decision in this case conflicts with the First Circuit's decision in United States v. Anagnos, 853 F.2d 1 (1st Cir. 1988). Also in disagreement with the First Circuit's Anagnos decision are decisions of the Second Circuit, in United States v. Persico, 853 F.2d 134, 136-138 (2d Cir. 1988), the District of Columbia Circuit, in United States v. Parrish, 887 F.2d 1107, 1109 (D.C. Cir. 1989), and the Fifth Circuit in United States v. DeValle, 894 F.2d 133 (5th Cir. 1990). We agree with petitioner that review by this Court is appropriate to resolve the disagreement among the circuits over their authority to dismiss appeals of defendants who flee after conviction and are later recaptured.

The Eleventh Circuit in this case followed its prior decision in United States v. Holmes, 680 F.2d at 1373, in which the court held that "a defendant who flees after conviction, but before sentencing, waives his right to appeal from the conviction unless he can establish that his absence was due to matters completely beyond his control." See also United States v. London, 723 F.2d 1538, 1539 (11th Cir.) (court should dismiss appeal of recaptured defendant who fled during trial and was convicted in absentia), cert. denied, 467 U.S. 1228 (1984). In contrast, in United States v. Anagnos, 853 F.2d at 2, the First Circuit held that it was improper to dismiss the appeal of a recaptured defendant who fled after the verdict but was subsequently recaptured and sentenced. The court explained that "Anagnos' misconduct was in the district court, and should affect consequences in that court, not ours." The court in Anagnos went on to consider the merits of the recaptured defendant's appeal. Id. at 2-5.

The Second Circuit, in United States v. Persico, supra, refused to consider the defendant's claims of trial error, holding that it could decline to reach those issues in light of the defendant's flight before sentencing. The court identified three considerations supporting dismissal of the defendant's appeal, even when the defendant has been recaptured prior to sentencing: (1) the defendant has "flout[ed] the judicial process by escaping"; (2) a rule of dismissal "has the salutary effects of discouraging escape and promoting the efficient operation of appellate courts"; and (3) "the delay occasioned by the period of a defendant's flight can

prejudice the prosecution should a new trial be ordered after a successful appeal." 853 F.2d at 137.[y]

In United States v. Parrish, supra, the District of Columbia Circuit likewise dismissed the appeal of a defendant who fled before sentencing and was at large for 14 years. The court did not decide whether a defendant who becomes a fugitive after conviction and files an appeal after being returned to custody "inevitably waives his statutory right to appeal the conviction regardless of the length or the circumstances of his flight." Nonetheless, the court rejected the analysis of the First Circuit in Anagnos and found "the reasoning of the Second and Eleventh Circuits more persuasive." 887 F.2d at 1108. The court noted that a defendant who becomes a fugitive "disdains the entire judicial system, not just the particular court his case has reached at the time he flees. Furthermore, he disrupts 'the orderly operation of the judicial processes within which defendants should press their claims.'" Ibid., quoting United States v. Persico, 853 F.2d at 138. Accordingly, the court dismissed the defendant's appeal in that case.

Finally, the Fifth Circuit in United States v. DeValle, supra, dismissed the defendant's appeal from her conviction when she fled before sentencing and was captured eight months later. The court declined to follow the First Circuit's decision in Anagnos, and instead followed Parrish, Persico, Holmes, and London, all of which

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[y] The Ninth Circuit, in Katz v. United States, 920 F.2d 610, 612-613 (1990), rejected the Second Circuit's analysis in Persico, although in a somewhat different setting.

held that a court of appeals has authority to dismiss a defendant's appeal from his conviction when the defendant has fled before sentencing and is subsequently recaptured. Following those decisions, the court held that "recapture prior to dismissal of the appeal (and indeed prior to the filing of a motion to dismiss the appeal) does not deprive the appellate court of authority to dismiss the appeal, at least as to trial proceedings completed before the appellant became a fugitive." 894 F.2d at 136.

2. The general principles applicable to flight by defendants after conviction are well settled. This Court and the courts of appeals have authority to dismiss the appeal of a criminal defendant who escapes from custody and remains a fugitive during the pendency of his appeal. In Molinaro v. New Jersey, 396 U.S. 365, 366 (1970), the Court explained that no persuasive reason exists to adjudicate the merits of such an appeal and that an escape "disentitles the defendant to call upon the resources of the Court for determination of his claims." See also Eisler v. United States, 338 U.S. 189 (1949); Bonahan v. Nebraska, 125 U.S. 692 (1887); Smith v. United States, 94 U.S. 97 (1876); Estelle v. Dorrough, 420 U.S. 534, 537 (1975) (per curiam) (noting that "[d]isposition by dismissal of pending appeals of escaped prisoners is a long-standing and established principle of American law").

This Court has not resolved the question whether the same rule should apply to a defendant who is recaptured before his appeal is dismissed. The Court, however, has upheld state court orders declining to review convictions of escaped criminal defendants even

when the defendant is no longer at large. In Allen v. Georgia, 166 U.S. 138, 142 (1897), the Court upheld the state court's dismissal of an appeal of an escaped prisoner and its refusal to reinstate the appeal upon his recapture. And in Estelle v. Dorrough, supra, the Court upheld a state court decision dismissing the appeal of a defendant who escaped after appealing and was recaptured two days later. The Court noted that the Texas statute requiring that disposition served ends similar to this Court's decisions upholding dismissal of appeals while the defendant remains a fugitive: "It discourages the felony of escape and encourages voluntary surrenders. It promotes the efficient, dignified operation of the [appellate court]." 420 U.S. at 537 (footnote omitted).

This case presents the question whether the same rule should apply in federal criminal proceedings, and it presents that question in the context of escapes occurring after conviction but before sentencing. Because the courts of appeals are divided on that question, and because the question arises with sufficient frequency to justify this Court's review, we do not oppose the petition for a writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

JOSEPH C. WYDERKO
Attorney

MAY 1992

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CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES** by mail on May 26, 1992.

JAMES R. GAILEY
FEDERAL PUBLIC DEFENDER
STEWART G. ABRAMS
ASSISTANT FEDERAL PUBLIC DEFENDER
101 N.E. 3RD AVENUE
SUITE 202
FT. LAUDERDALE, FL 33301

Kenneth W. Starr
KENNETH W. STARR
Solicitor General

May 26, 1992